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No. 10-518

In the
Supreme Court of the United States

ANDREA L. HOLMAN, Personal Representative of the Estate of LINDA CLIPPERT, deceased,
Petitioner,

v.

MARK RASAK, D.O.,
Respondent.

On Petition for Writ of Certiorari to the Michigan Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to grant the Petition where the Michigan Supreme Court held that Michigan law, which permits, but does not require ex-parte interviews between a plaintiff's treating physician and defense counsel, was in compliance with regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §1320, et seq., which likewise permit but do not require disclosure of protected health information in the course of judicial proceedings.

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REASONS FOR DENYING THE PETITION

The Michigan Supreme Court properly held that ex-parte interviews, which are permitted under Michigan law, are also consistent with HIPAA regulations, when made in compliance with the safeguards required by the Privacy Rule.

Michigan law is not contrary to HIPAA regulations[1] and thus can be reconciled with the disclosure requirements of HIPAA if disclosure is made in compliance with the safeguards required by the Privacy Rule. The decision below does not conflict with the decision of another state's court of last resort, nor does it implicate a federal question that has not been decided by this Court. Sup. Ct. Rule 10(b) and 10(c).

The Michigan Supreme Court's decision is not in conflict with *State ex rel. Proctor v. Messina*, 320 S.W.3d 145 (Mo. 2010) (Pet. App. at 57a). The Michigan Supreme Court was required to determine whether Michigan law was consistent with HIPAA on the issue of ex-parte communications; other state courts likewise determined this issue with regard to the laws of their state. There is general acknowledgment that federal law preempts a state law which is contrary to the Privacy Rule, unless the state law is more stringent than the Rule.

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[1] 42 U.S.C. §1320(d)(2)(a) authorized the Department of Health and Human Services ("HHS") to promulgate regulations regarding use and disclosure of protected health information ("PHI"). 45 C.F.R. parts 160 and 164, known as the "Privacy Rule . . . forbids disclosure of PHI except as allowed by its provision."

Importantly, HHS has made clear that federal privacy provisions were "not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected health information." *Standards for Privacy of Individually Identifiable Health Information*, 65 Fed. Reg. 82530 (Dec. 28, 2008) discussing 45 C.F.R. §164.512(e).[2]

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[2] Further support for the conclusion that ex-parte communication is not barred by the Privacy Rule is provided by the HHS response to a request seeking to provide an exception to an Oklahoma statute which allowed meetings between defense counsel and willing health care providers without patient authorization, subpoena, or court order. The report issued by the HHS Office for Civil Rights in 2003, was discussed in *Holmes v. Nightingale*, 158 P.3rd 1039, 1049-1050 (Okla 2007) (Colbert, J., concurring):

> In Oklahoma, the Oklahoma State Medical Association and the Oklahoma Hospital Association made a joint request to the Secretary of the Department of Health and Human Services for an exception to any preemptive effect of HIPAA on section 19(B) [an Oklahoma statute that establishes a waiver of the physician-patient privilege upon the filing of a medical malpractice lawsuit]. The Secretary delegated the decision on such requests to the Office for Civil Rights. On June 24, 2003, the Director of that office issued his response to the request.
>
> The response began by quoting the exemption request which noted that section 19(B) permits defense counsel in a medical malpractice action "to gather medical records and/or conference with willing health care providers without the necessity of a patient authorization, subpoena, or court order." After analyzing section 19(B) and HIPAA, **the response concluded that there was no preemption issue because "covered entities can comply with both [section] 19(B) and 45 C.F.R.**

The Michigan Supreme Court considered the effect of the Privacy Rule on existing Michigan law. *See Holman v. Rasak*, 486 Mich 429; 785 N.W.2d 98 (2010) (Pet. App. at 1a). The Court's careful resolution of this narrow issue does not constitute a conflict among state courts. Michigan law *permits* but does not require ex-parte communication and thus was not contrary to the Privacy Rule, which also permits disclosure of PHI in the course of judicial proceedings. Neither was state law an obstacle to the purposes and objectives of HIPAA. Although HIPAA is concerned with protecting the privacy of individual health information, it also balances the protection of individual privacy with the need for disclosure in some situations. *Holman* at 19a-20a.

A. The decision of the Michigan Supreme Court did not decide an important federal question in a way which conflicted with the decision of another state court of last resort.

In an attempt to transform the Michigan Supreme Court's decision into a conflict-creating question, Petitioner claims that the decision conflicts with *Proctor*. The Michigan Supreme Court's decision was based on its construction of Michigan law and does not

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§ 164.512(e)(1)(ii)-(vi). It is neither impossible for a health care provider to comply with both statutes, nor is complying with the Oklahoma statute an obstacle to the accomplishment or execution of the purposes and objectives of HIPAA." Thus, no exemption was required because preemption was not an issue. *Id.* (emphasis added).

affect another state court's resolution of the issue with respect to that state's laws.

A more thorough examination of *Proctor, supra* reveals that the Missouri Supreme Court relied on Missouri law in concluding that ex-parte communication was not available in Missouri, rather than on any prohibition on ex-parte interviews in the Privacy Rule. Missouri courts have no oversight authority to supervise informal discovery, which is not provided for by its court rules. *Id.* at 82a - 83a. The Missouri Rules of Court neither expressly forbid *ex parte* discussion nor expressly authorize it as a method of discovery. *Id.* at 67a. *Proctor* refused to add a "non-enumerated discovery method" to the Rules, citing potential risks to the physician-patient privilege. *Id.* at 67a-68a.

Proctor considered, as an issue of first impression, whether HIPAA pre-empted Missouri law on the question of ex-parte communication. *Id.* at 60a. The Court was required to "determine whether or not HIPAA's prohibition of the oral disclosure of plaintiff's protected health information by one or more of plaintiff's treating physicians, absent authorization by plaintiff, preempts Missouri law that fails to prohibit such ex-parte disclosures." *Id.* at 72a. Preemption by HIPAA would not occur unless the state law and HIPAA were "contrary," meaning that a covered entity would find it impossible to comply with both the state and federal requirements. *Id.* at 72a, n. 5.[3]

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[3] See also, Beverly Cohen, *Reconciling the HIPAA Privacy Rule With State Laws Regulating Ex Parte Interviews of Plaintiffs' Treating Physician*, 43 HOUS. L. REV. 1091 (2006), noting that the

The Missouri court examined the language of §164.512(e)(1) permitting a health care provider to disclose otherwise protected health information "in the course of any judicial or administrative proceeding" if that disclosure is made in response to:

> (i) *In response to an order of a court* or administrative tribunal provided that the covered entity *discloses only the protected health information expressly authorized by such order;* or
>
> (ii) *In response to a subpoena, discovery request,* or other lawful process that is *not accompanied by an order of a court* or administrative tribunal . . .

Id. at 77a.

Although exceptions to HIPAA's general prohibition on the disclosure of plaintiff's protected health information were created by 45 C.F.R. §164.512(e), the trial court erred in its application of that subpart. *Id.* at 78a. Disclosure must occur "in the course of" a "judicial proceeding," and in response either to a formal process, whether in the form of a court order, discovery request or other lawful process. *Id.*

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single error most frequently made by courts is the failure to determine whether state and federal law are contrary, and comparing a specific provision of HIPAA to a specific provision of state law. "The first step is critical because when the laws are not contrary, they generally can be reconciled without one law preempting the other, so that the subsequent, more difficult stringency analysis can be avoided." *Id.* at 1123.

The meaning of "in the course of" a judicial proceeding could vary depending on the context of its use. *Id.* at 79a. *Proctor* acknowledged that "in the course of" a judicial proceeding "would be commonly understood to include matters that occur while a case is pending in a judicial forum." *Id.* The phrase "judicial proceedings" had been interpreted broadly in the context of Missouri defamation actions, and more narrowly by the Missouri legislature for purposes of a criminal statute. *Id.* at 80a-81a. The Court concluded that a narrow definition was required:

> While neither HIPAA nor its regulations expressly define "in the course of" or "judicial proceeding," or expressly state whether the term should be given its common, narrow or broad legal definitions, a narrow definition is implicit in HIPAA's regulatory requirement in 45 C.F.R. §164.512(e)(1) that a covered entity may make disclosure only pursuant to a court order or subpoena, discovery request, or other lawful process. . . *Id.* at 80a.

Applying this definition, derived from Missouri state law, the Court reasoned:

> This regulation does not itself authorize any additional process or procedure for obtaining a court order, subpoena, or other lawful process; *that is left to the rules in the individual states.* *Id.* at 81a (emphasis added).

In this context, under *Missouri's* Civil Procedure Rules a trial court had authority and oversight only over: (1) pretrial motion proceedings and trial (*i.e.*, official proceedings in court) and (2) formal discovery

(*i.e.*, proceedings authorized by or held under the supervision of a court). *Id.* at 82a.

The rules did not authorize an order directing or authorizing a physician to engage in ex-parte communications. *Id.* at 84a. While Missouri law had not prohibited ex-parte communications with a treating physician, trial courts had never supervised these communications nor exercised authority over them, and did not have authority to compel a plaintiff to expressly authorize ex-parte discussions. *Id.* at 82a. Further, trial courts had no authority to force a physician, over his own objection, to engage in informal ex-parte discussions with an attorney during discovery. *Id.* Given *Missouri's* law, the meeting at which ex-parte communications occur was not a "judicial proceeding" because the trial court has no general oversight of the meeting or any control over it. *Id.* at 83a.

Thus, *Proctor* concluded that 45 C.F.R. §164.512(e), did not apply to ex-parte communications, and consequently, a trial court had no authority to issue a purported HIPAA order advising the plaintiff's non-party treating physicians that they may or may not participate in informal discovery via ex-parte communications. *Id.* at 83-84a. Although Missouri itself did not provide for ex-parte communications (because Missouri law did not provide any authority to do so), various courts in other states, when presented with the issue of whether ex-parte interviews with treating physicians were permissible in personal injury and medical malpractice cases after the enactment of HIPAA, had come to different conclusions. *Id.* at 81a, n.7.

For purposes of Missouri law, an ex-parte interview could not occur "in the course of a judicial proceeding" as the Missouri Supreme Court defined the phrase. *Id.* at 84a.

> Likewise, there is no regulation in the HIPAA framework that authorizes a trial court in *Missouri* to issue an order permitting a physician to divulge a patient's protected health information outside the confines of a judicial proceeding over which the trial court has direct supervision thereof. *Id.* at 84a. (emphasis added).

Missouri courts lacked authority pursuant to §164.512(e)(1)(ii) to authorize informal discovery, although other states which permitted informal discovery or other lawful process, such as Michigan, Georgia, and New Jersey, could conclude that ex-parte communication was permissible based on their own state laws. *Id.* at 81a, n.7. *Proctor* acknowledged, that "[i]f either the state law or HIPAA (or both) is permissive, that is, at least one of the statutes allows a particular action but does not compel it, then the statutes are not contrary under the impossibility and obstacle test." *Id.* at 85a, n.10.

The Michigan Supreme Court performed the same analysis to determine if Michigan law was preempted. *Holman* at 13a. Michigan law was permissive, allowing but not compelling ex-parte communication. *Domako v. Rowe*, 438 Mich 347; 475 N.W.2d 30 (1991). HIPAA allows such interviews if done in compliance with the safeguards required by §164.512(e)(1)(ii)(B) and (v). *Holman* at 14a. A covered entity could be in

compliance with both Michigan law and HIPAA. *Id.* at 22a-23a.

The Missouri Supreme Court's decision did not conflict with that of the Michigan Supreme Court, or various other state courts of last resort which have relied on their analysis of state law to determine if it is contrary to or preempted by federal regulations, and have concluded that the state laws satisfy the dictates of the Privacy Rule.

Contrary to Plaintiff's statement that "other state and federal jurisdictions have either held or suspected that HIPAA precludes ex-parte physician interviews," (Pet. Brf. at p. 12) these courts relied primarily on state law in reaching their conclusions regarding the availability of such interviews. In general, courts which permitted ex-parte communication prior to HIPAA continue to do so; those which barred it likewise continue to do so post-HIPAA.

- In *Croskey v. BMW of N. Am.*, No. 02-73747, 2005 WL 1959452 (E.D. Mich. Feb. 16, 2005), the Magistrate Judge's decision was *reversed*. *See* 2005 U.S. Dist. LEXIS 43442 (E.D. Mich. Nov.14, 2005, Edmunds, J.). The court concluded that Michigan law was preempted (without first considering whether it was contrary to HIPAA), but "[p]reemption does not extinguish the possibility, however, that the policy rationale behind Michigan law might fit neatly within the HIPAA framework." *Id.* at 10. The Court concluded that "[T]o allow Plaintiff to block the interview would be inconsistent with HIPAA's structure, and would impede defendant's access to evidence." *Id.* at 11.

- Two other opinions are likewise not as definitive as Petitioner asserts. Both *Law v. Zuckerman*, 307 F. Supp. 2d 705 (D. Md. 2004) and *Crenshaw v. Mony Life Ins. Co.*, 318 F. Supp. 2d 1015 (S. D. Cal. 2004) were extensively analyzed in *Bayne v. Provost*, 359 F. Supp. 2d 234 (N.D. N.Y. 2005). *Bayne* concluded that it could reasonably be inferred from each of these opinions that "if a qualified protective order, consistent with §164.512(e)(1)(ii)(B), (v)(A)(B) was in place that an ex-parte discussion with the health provider would be appropriate." *Id.* at 241. *Law* stated there were three ways in which disclosure could be accomplished, including pursuant to §164.512(e)(1)(ii)(B). *Law, supra* at 711, 712. Ex-parte interviews were legitimate as long as defendants' counsel complied with HIPAA. *Id.* at 712, 713.

- *Crenshaw* stated that "[o]nly formal discovery requests appear to satisfy the requirements of §164.512(e)," but also acknowledged HIPAA provides for disclosure in judicial proceedings if statutory safeguards are met, citing 45 C.F.R. §164.512(1)(e)(ii)(B) and (v). *Crenshaw*, 318 F. Supp. 2d at 1029.

- In *Beard v. City of Chicago*, 2005 U.S. Dist. LEXIS 374 (N.D. Ill. Jan. 10, 2005, Schenkier, J.), Plaintiff sought discovery relating to medical leaves of absence taken by paramedics. The City unsuccessfully argued these records were undiscoverable. If the City was not a covered entity HIPAA would not apply. *Id.* at 9-10. If it was a covered entity, the disclosure rules of §164.512(e) would allow disclosure of

PHI in response to a discovery request absent a court order. *Id.*

- The holding of *Moss v. Amira*, 826 N.E.2d 1001 (Ill. App. 2005) did not involve HIPAA; ex-parte communications had been barred under Illinois law on public policy grounds for nearly a decade prior to HIPAA. *See Petrillo v. Syntax Laboratories, Inc.*, 499 N.E.2d 952 (Ill. App. 1986).

- *Soto v. ABX Air, Inc.*, No. 07-11035, 2010 U.S. Dist. LEXIS 85222 (E.D. Mich. August 9, 2010, Magistrate Morgan) incorrectly held that Michigan law permitting ex-parte communication applied only to medical malpractice lawsuits, ignoring *Domako*, 438 Mich 347 (1991), which applied to personal injury actions generally.

The HIPAA Privacy Rule has been considered in many state appellate decisions and federal decisions which have concluded that HIPAA does not preclude ex-parte interviews if HIPAA procedural safeguards are followed. *See Arons v. Jutkowitz*, 9 N.Y.3d 393, 415; 880 N.W.2d 831 (2007) (holding that where there is a state provision and no comparable federal provision there could be no conflict between New York law and HIPAA on the subject of ex-parte interviews; HIPAA merely superimposes procedural prerequisites, citing 64 Fed. Reg. 59918, 59995); *Smith v. Am. Home Products Corp.*, 372 N.J. Super 105, 134; 885 A.2d 608 (2003) (concluding that since none of the HIPAA regulations explicitly addressed the issue of ex-parte interviews, informal discovery in New Jersey was governed by state law); *Holmes v. Nightingale*, 158

P.3d 1039, 1044-1045 (Okla 2007) (" . . . there is no bright line HIPAA rule barring all ex parte discussions. Rather, such contacts are appropriate once the protections required by HIPAA are met."); *In re: Collins, M.D.*, 52 Tex. Sup. J. 813; 286 S.W.3d 911 (2009) (rejecting a claim that to the extent Texas law authorized ex-parte communications with non-party treating physicians it was preempted by HIPAA. It was not contrary because disclosure was permitted in a number of circumstances, citing 45 C.F.R. §164.512(e)(1)(i), (ii)(A), (ii)(B)). *See also Reutter v. Weber*, 179 P.3d 977 (Colo 2007); *Moreland v. Austin*, 670 S.E.2d 68; 284 Ga 730 (2008); *Sample v. Zancanelli Mgmt. Corp.*, 2008 U.S. Dist. LEXIS 13674 (D. Kan., Feb. 21, 2008, O'Hara, J.); *Hulse v. Suburban Mobile Home Supply*, 2006 U.S. Dist. LEXIS 74468 (D. Kan., Oct. 12, 2006, Botswick, J.); *Weiss v. Astellas Pharma, U.S.*, 2007 U.S. Dist. LEXIS 53453 (E.D. Ky July 23, 2007, Todd, J.).

The impact of HIPAA has been considered on a state-by-state basis, with numerous states concluding that state laws can "fit neatly within the HIPAA framework", *Croskey*, 2005 U.S. Dist. LEXIS 43442 at *3 , by complying with the procedural prerequisites of the HIPAA Privacy Rule.

1. **While a major goal of the Privacy Rule is to assure that individual health information is safeguarded, disclosure of protected health information may be made in the public interest.**

HHS has stated that "[t]he Rule strikes a balance that permits important uses of information, while protecting the privacy of people who seek care and

healing." HHS Office for Civil Rights, *Summary of HIPAA Privacy Rule*, http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf (last visited November 12, 2010) at 1.

Protecting the privacy of individual health information is not enforced to the exclusion of all other goals, but is instead balanced with the need for disclosure as evidenced by various provisions of the Rule including 45 C.F.R. §164.512. Included among these authorized disclosures are those made in the course of judicial proceedings:

> Covered entities may disclose protected health information in a judicial or administrative proceeding if the request for the information is through an order from a court or administrative tribunal. Such information may also be disclosed in response to a subpoena or other lawful process if certain assurances regarding notice to the individual or a protective order are provided. 45 C.F.R. §164.512(e); *Summary of HIPAA Privacy Rule, supra* at 7.

While there is unquestionably a broad-based recognition of the importance of protecting patient privacy in the digital age, Petitioner's attempt to equate HIPAA's protection of PHI with a constitutional right to privacy, referenced in various court decisions falls short. (Pet. Brf., p. 13). Decisions which address the existence of a constitutional right to privacy in medical records also acknowledge the authority of the state to access such information for purposes consistent with the police power. *Whalen v. Dobbs*, 429 U.S. 589, 598; 97 S. Ct. 869; 51 L.Ed. 2d 64 (1977). The cases cited by Petitioner for the proposition that

plaintiffs have a constitutional right to privacy of medical information, involved a state actor as a party. This lawsuit is a negligence action brought pursuant to state law.

2. Numerous courts have recognized the legitimate benefits to be derived from ex-parte interviews with treating physicians.

All parties have a right of equal access to evidence and witnesses. Arguments for and against the use of ex-parte interviews with treating physicians, after a plaintiff has put her medical condition at issue by filing a lawsuit were discussed in *Doe v. Eli Lilly & Co., Inc.*, 99 F.R.D. 126 (D.D.C. 1983). "[N]o party to litigation has anything resembling a proprietary right to any witness' evidence. Absent a privilege no party is entitled to restrict an opponent's access to a witness, however partial or important to him, by insisting upon some notion of allegiance." *Id.* at 128. As long as no privilege prevented it, "an adversary may inquire, in advance of trial, by any lawful manner to learn what any witness knows. . ." *Id.* Potential for influencing trial testimony was inherent in every contact formal or informal, but there were sufficient sanctions for any attempt at *improper influence*. *Id.*

> [T]here are entirely respectable reasons for conducting discovery by interview *vice* deposition: it is less costly and less likely to entail logistical or scheduling problems; it is conducive to spontaneity and candor in a way depositions can never be; and it is a cost-efficient means of eliminating non-essential witnesses from the list completely. *Id.*

Moreover, the court noted the threat implicit in a plaintiff's refusal:

> The inchoate threat implicit in refusing or qualifying permission to speak to a witness in possession of privileged information operates to intimidate the witness, who is then placed in the position of withholding or divulging what he knows at his peril, and is itself a species of improper influence. It also enables the party so wielding the privilege to monitor his adversary's progress in preparing his case by his presence on each occasion such information is revealed while his own preparation is under no such scrutiny. The Court concludes that it would be an abuse of the privilege to allow it to be used in such a manner which has no relation to the purposes for which it exists. *Id.* at 128-129.

"[I]nformal discovery devices like ex-parte interviews, [ ] have the potential to streamline discovery and foster the prompt resolution of claims." *Arons,* 9 N.Y.3d at 408. *Arons* rejected the alleged danger of "overreaching" stating that "it is of course assumed that attorneys would make their identity and interests known to interviewees and comport themselves ethically." *Id.* at 407 (quoting *Niesig v. Team I,* 76 N.Y.2d 363, 376; 558 N.E.2d 1030 (1990)). The danger that medical information as to which the privilege had not been waived might be unwittingly divulged by a physician in a more casual setting and without opposing counsel present was rejected. *Id.* at 410.

The Michigan Supreme Court also concluded that informal discovery could be useful, efficient and cost-effective:

> Restricting parties to formal methods of discovery would not aid in the search for truth, it would only serve to complicate trial preparation. MCR 1.105 expressly states that the court rules are "to be construed to secure the just, speedy, and economical determination of every action . . ." *Ex parte* interviews appear to advance each of these aims. As recognized by other jurisdictions, such informal methods are to be encouraged, for they facilitate early evaluation and settlement of cases, with a resulting decrease in litigation costs, and represent further the wise application of judicial resources.... There is no justification for requiring costly depositions, for example, without knowing in advance that the testimony will be useful. The public policy of simplifying litigation and encouraging settlement militates in favor of these interviews, providing there has been a waiver of the physician-patient privilege. [N]o party to litigation has anything resembling a proprietary right to any witness's evidence. Absent a privilege no party is entitled to restrict an opponent's access to a witness.... *Domako*, 438 Mich at 360-361.

Arguments advanced by Petitioner against ex-parte communication have been rejected by many state courts, which continue to consider them "an accepted, informal method of assembling facts and documents in preparation for trial." *In re: Diet Drug Litigation*, 348 N.J. Super. 546, 555; 895 A.2d 493 (2005).

Numerous state courts have concluded that the reasons favoring ex-parte communication outweigh the potential disadvantages. Others reached different conclusions. Their decisions were not mandated by HIPAA, but were grounded in state law which either permitted or precluded this type of discovery. HIPAA was never intended to create a physician-patient privilege. The HIPAA standard for disclosure of medical information in judicial proceedings was "purely procedural" in character. *Northwest Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 926 (7th Cir. 2004). Concerns over the improper use of informal discovery are addressed by the requirements of 45 C.F.R. §164.512(e)(1)(v) prohibiting the disclosure of protected health information for any purpose other than the litigation or proceeding for which such information was requested and requiring the return to the covered entity or destruction of the information at the end of the litigation or proceeding.

B. The Michigan Supreme Court's Decision That HIPAA Did Not Displace Michigan Law Regarding Informal Discovery If Procedural Prerequisites Are Satisfied Was Correct And Presents No Compelling Reason For Further Review.

The Michigan Supreme Court considered whether Michigan law regarding informal discovery was contrary to HIPAA and thus preempted. "Under HIPAA, '[a] standard, requirement, or implementation specification' of HIPAA 'that is *contrary* to a provision of State law preempts the provision of State law' unless, among other exceptions, '[the] provision of State law relates to the privacy of individually identifiable health information and is more stringent

than a standard, requirement, or implementation specification adopted under' HIPAA." 45 C.F.R. 160.203." *Holman* at 13a. This is an express, but limited preemption provision. State law is "contrary" to the Privacy Rule when compliance with both state and federal rules would be impossible, or the state law is an "obstacle" to the accomplishment and execution of the full purposes and objectives of the Privacy Rule. 45 C.F.R. 160.203. The tests for the definition of "contrary" were adopted from the jurisprudence of "conflict preemption." 65 Fed. Reg. 82462, *82580. HHS has acknowledged that "since preemption is a judicially developed doctrine, it is reasonable to interpret this term as indicating that the statutory analysis should tie in to the analytical formulations employed by the courts." 65 Fed. Reg. 82462, *82580.

The area of physician-patient privilege is a field which states have traditionally occupied. Preemption requires an examination of Congressional intent. "[T]he historic police powers of the States are not to be superceded by federal law unless that was the clear and manifest purpose of Congress." *Wisconsin Public Intervener v. Martier*, 501 U.S. 597, 605; 111 S. Ct. 2476; 115 L.Ed. 2d 532 (1991). HIPAA preemption is properly characterized as limited conflict preemption. HHS has confirmed that where state law exists and no analogous federal requirement exists, the state requirement would not be "contrary to" the federal requirement and would therefore not trigger preemption. Also, "a state law may not be preempted because there is no conflict with the analogous federal requirement; in such a situation, both laws can, and must, be complied with." 65 Fed. Reg. 82462, *82581.

Finally, HHS confirms that the statute dictates a provision-by-provision comparison of state and federal requirements, not an overall comparison. 65 Fed. Reg. 82462, *82582.

Therefore HIPAA does not prevent informal discovery from occurring, but merely superimposes procedural prerequisites. "Michigan law is not 'contrary' to HIPAA . . . because it is possible for a covered entity to comply with both Michigan law and HIPAA." *Holman* at 13a. Nor is Michigan law "an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA." HIPAA protects the privacy of health information but also balances that need with the need for disclosure. *Id.* at 19a-20a.

The Michigan Supreme Court's analysis of the interplay between Michigan law and HIPAA and the Court's conclusion that HIPAA does not displace Michigan law regarding informal discovery if the requirements of §164.512(e)(1)(ii)(B) are satisfied was correct. There is no compelling reason to further consider the issue.

C. The Michigan Supreme Court Correctly Held that HIPAA Permits Ex Parte Interviews With Plaintiff's Physician As Long As HIPAA Procedural Prerequisites Are Followed.

The "Privacy Rule" sets forth standards and procedures for the collection and disclosure of PHI, which includes "any information, whether oral or recorded in any form or medium that . . . is created or received by a health care provider. . . and relates to the

past, present or future physical or mental health or condition of an individual. . ." 42 U.S.C.§1320d(4); 45 C.F.R. §160.103.

45 C.F.R. §164.502 states the general rule for the use and disclosure of PHI and provides that "[a] covered entity may not use or disclose [PHI], except as permitted or required by this subpart or by subpart C of part 160 of the subchapter." 45 C.F.R. §164.502(a). "Use" includes an examination of PHI; "disclosure" includes divulging or providing access to PHI. 45 C.F.R. §160.103. A "health care provider" is a "covered entity" and is thus prohibited from using or disclosing PHI in any form, oral, written or electronic. 42 U.S.C. §1320d-1(a)(3). There are various exceptions to the rule of non-disclosure, many of which are codified at 45 C.F.R. §164.512 titled: *"Uses and disclosures for which an authorization or opportunity to agree or object is not required."* Among these exceptions is 45 C.F.R. §164.512(e) addressing disclosures for judicial and administrative proceedings. This provision authorizes, but does not mandate such disclosure. Once one of the alternate provisions of §164.512(e)(1) is complied with HIPAA authorizes a covered entity's voluntary participation in an ex parte interview.

Respondent sought disclosure under 45 C.F.R. §164.512(e)(1)(ii)(B):

> (e) Standard: Disclosures for judicial and administrative proceedings.
>
> (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

* * * * *

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

* * * * *

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

If a health care provider receives "satisfactory assurance" under §164.512(e)(1)(iv) that "reasonable efforts" have been made to secure a qualified protective order that meets the requirements of subsection (e)(1)(v), "disclosure of protected health information by a covered entity during an ex-parte interview is consistent with both Michigan law and HIPAA." *Holman* at 16a.

1. The Introduction To 45 C.F.R. §164.512 Requires Neither That The Patient Authorize, Nor That The Covered Entity Inform The Patient Of The Disclosure of PHI.

Petitioner claims that the introduction to §164.512 does not permit disclosure of PHI unless authorized by plaintiff or unless the covered entity informs plaintiff of the PHI which is disclosed. The introduction states:

> A covered entity may use or disclose protected health information without the *written consent or authorization of the individual as described in Secs. 164.506 and 164.508, respectively, or the opportunity for the individual to agree or object as described in Sec. 164.510, in the situations covered by this section*, subject to the applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally. (Emphasis added).

"Sections 164.508 and 164.510 require a written authorization for the events and circumstances set forth therein. Neither of these sections refers to a "judicial proceeding" . . . as referred to in §164.512." *Bayne*, 359 F. Supp. 2d at 236, n.4. Thus a court "can presume that they have no applicability to litigation or the issues confronted in our case." *Id.* Neither written authorization of §164.506 or §164.508 nor the opportunity to agree or object described in §164.510 is necessary in the twelve exceptions provided for in

§164.512. Justice Hathaway interpreted the second sentence of the introduction to contradict the first, and to allow oral release of PHI only if a patient specifically authorized such release or if the covered entity informed the patient of what is described. (Petitioner's Brief at 22). Such an interpretation would render §164.512 a nullity. The second sentence indicates simply that in situations in which a covered entity is required to inform an individual of a disclosure permitted by §164.512 or when the individual may agree to a use or disclosure permitted by §164.512, the information or agreement may be given orally rather than in writing.

> The purpose of the introductory paragraph is to explain that, for the uses and disclosures described in the lettered subsections of 45 C.F.R. §164.512, the general requirements of a "written authorization of the individual as described in §164.508" and "the opportunity for the individual to agree or object as described in §164.510" need not be met. The second sentence explains how the covered entity may *inform* the individual of the use or disclosure when required to do so, and how the individual may *agree* to the use or disclosure. This introductory paragraph does not govern the form of a *use or disclosure* of *protected health information. Id*; *Holman* at 11a, n.4 (emphasis in original).

Other provisions of §164.512, permit disclosure under a variety of circumstances which do not contemplate authorization by the individual or require the covered entity to inform the individual of the use or disclosure of PHI. Judicial proceedings are forums in which PHI may be disclosed pursuant to Section

164.512. This section "unequivocally permits health care providers to disclose PHI without patient consent in judicial proceedings." *Bayne*, 359 F. Supp. 2d at 237.

2. HIPAA Does Not Uniformly Mandate Either Prior Authorization Or Notice Prior To Disclosure Of PHI.

Petitioner claims that the introductory language of §164.512 is "consistent with other HIPAA regulations mandating notice to the patient of any PHI disclosed." In Petitioner's view "[t]his further confirms that HIPAA precludes ex-parte interviews." (Pet. Brf. at 22).

Petitioner provides two examples: §164.508(c) and §164.512(e)(1)(i), disclosure by written authority and disclosure pursuant to court order respectively. A third category, §164.512(e)(1)(ii)(B), relied on by Respondent, allows disclosure of PHI in response to a subpoena, discovery request or other lawful process, without a court order. There is no basis to conclude that these methods of disclosure connote "formal" discovery and that all PHI must be "previously specified and requested." (Pet. Brf. at 24-25).

Although §164.512(e)(1)(i) permits disclosure of PHI in response to a court order only as expressly authorized, §164.512(e)(1)(ii) permits disclosure in response to a subpoena, discovery request or other lawful process under two alternate circumstances. Under subparagraph (A) if the party seeking the information provides satisfactory assurance that reasonable efforts have been made to insure that notice of the request has been given to the individual

who is the subject of the request, *or* alternately under subparagraph (B) disclosure is permitted if the requesting party provides satisfactory assurance that reasonable efforts have been made to secure a qualified protective order. Disclosure pursuant to subparagraph (B) does not require advance notice or prior disclosure of specific protected health information. Indeed, a qualified protective order need not be obtained; the provision requires only "satisfactory assurance" under §164.512(e)(1)(iv) that reasonable efforts have been made to secure a qualified protective order pursuant to (v). *See* §164.512(e)(1)(ii)(B). This subparagraph requires neither notice nor plaintiff's consent prior to an interview. *Croskey*, 2005 U.S. Dist. LEXIS 43442 at *5.

Petitioner points to language in the qualified protective order provision which prohibits use or disclosure of *the* protected health information and concludes that use of *the* as a definite article, has a "specifying or particularizing effect." (Pet. Brf. at 26). However, "the" may have an alternate meaning depending on context. Although "the" may be used to indicate a unique or particular term, it may also be used, as here, "to mark a noun as being used generically" or to denote "one of many of a class or type." Webster's New Universal Dictionary 1965 (1996).

Section §164.512(e)(1)(ii)(B) provides for disclosure of PHI in the course of judicial proceedings without notice to plaintiff or prior disclosure of specific information sought.

3. The Clear Language Of §164.512(e)(1) Allows Disclosure Of PHI In A Wide Range Of Circumstances Related To Judicial Proceedings.

45 C.F.R. §164.512(e)(1) provides:

> (e) Standard: Disclosures for judicial and administrative proceedings.
>
> (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
>
> (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or
>
> (ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:
>
> (A) the covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health

> information that has been requested has been given notice of the request; or
>
> (B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

The disclosure of PHI in judicial proceedings is nowhere limited to "formal" discovery. Neither "discovery" nor "lawful process" is defined by HIPAA and HIPAA regulations contain no reference to "formal" discovery, nor to ex-parte interviews.[4]

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[4] "[N]owhere among HIPAA's express purposes, or even in HIPAA's legislative history, is any reference made to *ex parte* interviews. Rather, the impact on informal discovery tactics in litigation has come without an express congressional intent to that end. Not only is there a conspicuous absence of 'any reference to or balancing of the competing policy considerations regarding *ex parte* interviews,' but the DHHS specifically stated that at least one of its HIPAA privacy regulations was 'not intended to disrupt current practice whereby an individual who is party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected information.' It is important to note that this statement says nothing about whether such information has to be provided informally or through formal judicial proceedings, and thus does nothing to clarify what effect HIPAA will have on

Acceptance of Petitioner's proposed interpretation of §164.512(e)(1)(ii) would require the Court to read additional language into the regulation which is not there. Principles of statutory construction apply to the interpretation of administrative rules. Petitioner's interpretation would require a court to read additional language into §164.512(e)(1)(ii), by adding "formal" in order to limit the reference to discovery in this provision. This violates a basic rule of statutory construction that additional terms may not be read into unambiguous language. *See Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt.*, 541 U.S. 246, 252; 124 S. Ct. 1756; 158 L.Ed. 2d 529 (2004). By its terms, §164.512(e)(1)(ii) contemplates disclosure of protected health information in a wide range of circumstances during the course of judicial proceedings. Under Michigan law discovery includes ex-parte interviews as a form of "informal" discovery; one not specifically provided for in the Michigan Court Rules, but nonetheless sanctioned by court decision in *Domako*, 438 Mich at 359-360. The "discovery request" is the request for an ex parte interview consistent with §164.512(e)(1)(ii)(B).

Section 164.512(e)(1)(ii) also allows disclosure pursuant to "other lawful process." Again, this term is not defined, but its inclusion suggests that it applies to an additional category of disclosures, separate and distinct from subpoena and discovery requests. Effect should be given to each phrase, clause and word in a

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informal proceedings such as *ex parte* interviews." Daniel M. Roche, *Don't Ask, Don't Tell: HIPAA's Effect on Informal Discovery in Products Liability and Personal Injury Cases*, 2006 BYU L. REV. 1075, 1082-1083 (2006).

statute so as not to render it nugatory. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339; 99 S. Ct. 2326; 60 L.Ed. 2d 931 (1979). Failing a specific definition in the regulations, the plain and ordinary meaning of the term should be applied. *See U.S. v. Labonte*, 520 U.S. 751, 757-758; 117 S. Ct. 1673; 137 L.Ed. 2d 1001 (1997). It is appropriate to consult a dictionary in such circumstances. *Id.* The term "lawful" is defined as "not contrary to law; permitted by law; legal." BLACK'S LAW DICTIONARY, (8th ed. 2004) "Process" includes a number of definitions, including "the proceedings in any action or prosecution; legal process is defined as "process validly issued," and regular process, "a process that issues lawfully according to prescribed practice." *Id.*

A request for ex-parte communication qualifies as "other lawful process." The definition of state law includes "a constitution, statute, regulation, rule, common law or other state action having the force and effect of law." 45 C.F.R. §160.202. A process or procedure which has been approved by a decision of the state's highest court and authorized by statute would qualify as "lawful process." Given the holding in *Domako*, which permitted but did not require ex-parte interviews, as well as MCL 600.2912f, state law permits these interviews which are lawful methods, and occur in the normal course of procedure.[5] By its

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[5] Petitioner argues that ex-parte interviews of treating physicians are permitted by MCL 600.2912f once a plaintiff has given *notice* of her intent to file suit, and are therefore not in the course of judicial proceedings. That provision has no application to the facts in this case. Section 2912f applies to both pre and post-suit procedures. There is no question that the ex-parte interview with Plaintiff's treating physician was sought by defense counsel only

language, the Privacy Rule does not impose the restrictions which Petitioner seeks, nor does state law. Plaintiff claims that any "lawful process" must accord the basic requirements of procedural due process - notice and opportunity to be heard, citing *Morrisey v. Brewer*, 408 U.S. 471, 488-89, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). The Fourteenth Amendment requirement of due process protects against deprivations of liberty or property by the State and is inapplicable to a negligence claim between two private parties. U.S. Const. Amend. XIV, §1; *Shelley v. Kramer*, 334 U.S. 1, 13; 68 S. Ct. 836; 92 L. Ed. 1161 (1948).

As a practical matter, Petitioner will receive prior notice of any request for an ex-parte interview along with an opportunity to object, because any interview will be preceded by a motion for protective order seeking ex-parte communication. This provides sufficient opportunity to request any additional restrictions if there is good cause to do so. The trial courts retain discretion under MCR 2.302(c) to issue protective orders and to impose conditions on ex-parte interviews as necessary. *Holman* at 20a-21a.

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after the lawsuit was filed. MCL 600.2912f authorizes such ex-parte communication after a lawsuit has been filed, as it was here. The application of the statute to pre-suit contact was not raised by Petitioner nor addressed by the state courts and is not part of Petitioner's Petition, nor was it part of the factual basis for Petitioner's appeal in state court. There is not only a statutory basis for permitting ex-parte communication in judicial proceedings, but also a common law basis for doing so pursuant to *Domako*, 438 Mich 347 (1991).

4. HIPAA Specifically Provides For Disclosure Of PHI, Which Includes Both Oral And Written Information, In The Course Of Judicial Proceedings.

45 C.F.R. §164.512(e)(1)(ii)(B) specifically provides for disclosure of PHI if a covered entity receives satisfactory assurance that reasonable efforts have been made by the party seeking the information to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v):

> (v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:
>
> (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and
>
> (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

Petitioner complains that orally disclosed PHI cannot "possibly be protected under 45 C.F.R. §164.512(e)(1)(v)" because "oral" information cannot be destroyed or returned to the covered entity at the end of the litigation. (Pet. Brf. at 30). Petitioner reasons that only disclosure of documentary evidence is contemplated. The Michigan Supreme Court rejected this argument.

> Plaintiff and the dissent also argue that an ex parte interview is not a proper subject of a qualified protective order because 45 CFR 164.512(e)(1)(v)(B) requires the "return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding." Plaintiff argues that this provision thus contemplates that only "documentary" evidence will be the subject of a qualified protective order. We disagree. The distinction plaintiff makes between "documentary" information and other types of information is not one that exists in HIPAA. As previously discussed, "health information" explicitly includes "oral information," and all individually identifiable health information transmitted or maintained in any form or medium is "protected health information" under HIPAA. 45 CFR 160.103. We see no logical reason that "protected health information" maintained in a physician's records and conveyed verbally by a physician during an ex parte interview cannot be the subject of a qualified protective order under 45 CFR 164.512(e)(1)(v). The requirement in subsection (e)(1)(v)(B) to return or destroy "protected health information" applies to *all*

> protected health information, as the term is defined under HIPAA and its regulations.
>
> Moreover, plaintiff's argument proceeds from the assumption that an ex parte interview never generates a physical record. This is simply incorrect. For instance, if the ex parte interview is conducted orally, a recording of the conversation could be produced. Alternatively, defense counsel and a physician might choose to conduct an ex parte interview via e-mail. And written documents may be exchanged at an ex parte interview. All of these records could be "returned" or "destroyed," thus making the requirement of 45 CFR 164.512(e)(1)(v)(B) applicable, and defeating the argument that a qualified protective order cannot be fashioned for an ex parte interview under the plain meaning of the statute. (Pet. App. at 16a - 18a).

PHI includes both written and oral information. 45 C.F.R. §160.103. 42 U.S.C. §1320d(4) states that, "health information means any information, whether oral or recorded in any form or medium." References to PHI must be deemed to apply to oral and written information, as well electronic or any other form. PHI may be disclosed during the course of judicial proceedings, thus indicating that HIPAA contemplates that PHI, which may eventually be used in litigation, should be made available during the discovery phase. The only method of obtaining PHI in oral form is through an interview. Even during the course of an ex-parte interview it is possible that a tangible record might be generated, through notes, recordings or e-mails. *Holman* at 17a. Such information could be returned or destroyed. Any construction which would

limit the Rule's definition to qualified protective orders authorizing disclosure in written form only would be inconsistent with the definition of "protected health information" in 42 U.S.C. §1320(d)(4) and 45 C.F.R. §160.103. If the definition was therefore rendered ambiguous, a court would interpret §164.512(e)(1)(v) in accord with the underlying purpose of HIPAA, which is to safeguard protected health information. *See U.S. v. Article of Drug Bacto-Unidisk,* 394 U.S. 784, 799; 89 S. Ct. 1410; 22 L.Ed. 2d 726 (1969). In doing so, the only reasonable interpretation is that this provision applies only in cases where protected health information is disclosed in tangible form and would have no application where oral disclosure was contemplated. Moreover, disclosure is permitted by other provisions of §164.512(e) which do not require return or destruction of PHI.

Even if tangible documentary information is returned at the end of litigation, the attorney who has reviewed such information still retains knowledge of the contents of the documents and the ability to convey that information to third parties, notwithstanding the destruction of documents, tapes etc. There is no substantive distinction to be made on this basis between safeguarding oral and tangible medical information. In either case, information is retained by the attorney and it cannot be "returned or destroyed" at the end of the litigation. Rigid application of §164.512(e)(1)(v)(B) would produce a result which was obviously unintended. The end result remains the same whether the disclosure is oral or written.

Finally, Plaintiff's argument presupposes that there is something inherently improper about ex-parte communication, an argument which has been rejected

by various courts. *See Harris v. Whittington*, 2007 U.S. Dist. LEXIS 5482 (D. Kan., Jan. 19, 2007, Humphreys, J.) ("HIPAA rules and regulations contemplate the disclosure and use of medical information in a judicial proceeding. . . moreover, implicit in plaintiff's objection is the suggestion that informal interviews out of the presence of opposing counsel are inherently wrong. This argument presumes that counsel will engage in inappropriate and/or unethical conduct when interviewing fact witnesses, a presumption this Court rejects."); *See also Arons*, 9 N.Y.3d at 410 (rejecting this "danger of overreaching"). Attorneys are bound by ethical rules governing their conduct, including Michigan Rule of Professional Conduct 3.4 which prevents a lawyer from knowingly disobeying an obligation under the rules of a tribunal.

Admittedly, some states have expressed concern regarding the protection of medical information during an ex-parte interview. In *EEOC v. Boston Market Corp.*, 2004 U.S. Dist. LEXIS 27338, *5 (E.D.N.Y. Dec. 16, 2004, Wall, J.), while the court declined to allow ex-parte interviews, it acknowledged that they were "not expressly prohibited by HIPAA," and left open the possibility that defendant could move for a new protective order that included the requirements of HIPAA. 2004 U.S. Dist. LEXIS 27338 at *5. Other state cases cited by Petitioner did not rely on provisions of the Privacy Rule but dealt exclusively with state law and policy.

Brown v. Horbar, 792 N.Y.S. 2d 314 (N.Y. Sup. Ct. 2004) is no longer authoritative. *Arons* rejected *Brown's* concern that defense counsel might inquire into irrelevant matters if not judicially supervised. *Arons*, 9 N.Y.3d at 410. *State ex. rel. Kitzmiller v.*

Henning, 437 S.E.2d 452, 455 (W. Va. 1993) and *Roosevelt Hotel, Ltd. P'ship v. Sweeney*, 394 N.W.2d 353 (Iowa 1986) both pre-date the Privacy Rule and address state law and policy concerns. *Sorenson v. Barbuto*, 177 P.3d 614 (Utah 2008) precluding ex-parte physician interviews was not based on HIPAA, but state law exclusively. *Manion v. N.P.W. Medical Ctr.*, 676 F. Supp. 585 (M.D. PA 1987) interpreting Pennsylvania law, was called into question by a later decision, *MacDonald v. United States*, 767 F. Supp. 1259, 1299 (M.D. PA. 1991).

Many state courts have considered the continued availability of ex-parte interviews in light of the privacy protections afforded by HIPAA, and have concluded that informal discovery allowed by state law may continue, if the procedural prerequisites mandated by HIPAA are satisfied. The issue of the physician patient-privilege is a field historically left to the states. There is no physician-patient privilege under federal law. *Northwest Mem'l Hosp.*, 362 F.3d at 926.

Whether to allow ex-parte communication or not is primarily a policy decision on which there is a divergence of opinion among the states. One commentator has noted that "[n]ot only is there a conspicuous absence of 'any reference to or balancing of the competing policy considerations regarding ex-parte interviews,' but the DHHS specifically stated that at least one of its HIPAA privacy regulations was 'not intended to disrupt current practice whereby an individual who is party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her

protected information.'" *Don't Ask, Don't Tell*, *supra* at 1082-1083.

HIPAA does not address the issue of informal discovery or exclude any informal discovery devices; rather it allows disclosure if its procedural requirements are satisfied. There is no evidence of an intent in the statute or the regulations to displace any specific state rule regarding discovery practice.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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